



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

Mr. Wm. Hulse Wagner
McLeod, Alexander, Powel & Apffel, P.C.
1990 Post Oak Boulevard, Suite 270
Houston, Texas 77056

OR2012-11943A

Dear Mr. Wagner:

This office issued Open Records Letter No. 2012-11943 (2012) on July 31, 2012. Since that date, we have received new information that affects the facts on which the ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on July 31, 2012. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID # 467905.

The Port of Galveston (the "port"), which you represent, received a request for pension information, payouts, and "other information" regarding a named former employee. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.110, 552.117, 552.136, 552.137, and 552.147 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of the named former employee. Accordingly, you notified the named former employee of the request for information and of his rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from an attorney for the named former employee. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the port's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e) of the Government Code, a governmental body is

required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). Although you timely submitted a copy of the written request and a copy of the specific information requested, you did not provide any arguments stating the reasons why the stated exceptions apply. Consequently, you have failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. You raise sections 552.101, 552.102, 552.110, 552.117, 552.136, 552.137, and 552.147. Because these exceptions can provide a compelling reason to withhold information, we will consider the applicability of these sections to the submitted information. However, we note section 552.110 protects the interests of third parties, not governmental bodies. Therefore, because the third party does not raise section 552.110, the port may not withhold any of the submitted information under that section.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by statute. Gov't Code § 552.101. Section 552.101 of the Government Code encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election

of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. See ORDs 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependant care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to a retirement program. See ORD 600. On the other hand, information is excepted from disclosure if it relates to a voluntary investment the employee made in an optional benefits plan offered by the employer. *Id.* This office has also determined that a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. See Attorney General Opinion GA-0572 at 3-5 (2007) (stating that net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to the public).

Portions of the submitted information are related to the named former employee's retirement benefits. You explain that the port has three retirement plans, all of which are funded, at least in part, by the port. You further explain the first plan, a defined benefit pension plan, was funded entirely by the port and employees did not make contributions, and the other two plans require mandatory employee contributions. Accordingly, we find there is generally a legitimate public interest in information regarding the named former employee's retirement plans. Upon review, however, we find a portion of this information, which we have marked, reflects personal financial decisions of the employee at issue that we find to be intimate and embarrassing and not of legitimate public concern. Therefore, the port must withhold this information, as well as other personal financial information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. We find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we have marked information that must be withheld under section 552.102(a) of the Government Code. No portion of the remaining information may be withheld under section 552.102(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the port must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the port may not withhold the marked information under section 552.117(a)(1).

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). We note check numbers are not access device numbers for purposes of section 552.136. Thus, the port may not withhold the check number you have marked, which we have marked for release, under section 552.136. However, the port must withhold the account numbers and the routing number you have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the port must withhold the personal e-mail address you have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.

You also raise section 552.147 of the Government Code for the submitted information. This section provides “[t]he social security number of a living person is excepted” from required public disclosure under the Act. Gov’t Code § 552.147. To the extent section 552.117 of the Government Code does not apply to the marked social security number, the port may withhold it under section 552.147.¹

In summary, the port must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; the information we have marked under section 552.102 of the Government Code; the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code to the extent the individual at issue timely requested confidentiality; except for the information we have marked for release, the information you have marked under section 552.136 of the Government Code; and the e-mail address you have marked under section 552.137 of the Government Code, unless the owner has consented to its release. To the extent section 552.117 of the Government Code does not apply to the marked social security number, the port may withhold it under section 552.147. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

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¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. See Gov’t Code § 552.147.

Ref: ID# 467905

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)